TWO CHEERS FOR TRUMP'S FLAG BURNING STANCE

Bill Donohue

This article recently appeared in The American Spectator.

President Trump's criticism of the 1989 Supreme Court decision, *Texas v. Johnson*, that legalized burning the American flag, is deserving of great respect, notwithstanding some problems with it.

Trump was right to say, "The people in this country don't want to see our American flag burned and spit on." This alone is not sufficient reason to ban flag burning, but it is not irrelevant to the issue. More important, he was right to sneer at the high court when he said, "they called it freedom of speech." This needs to be expanded upon to understand why he is not off-base.

Two cheers for Trump. His reason for sneering, however, is not deserving of a third cheer.

"But there's another reason [besides free speech] which is perhaps much more important," he said, "it's called death. Because what happens when you burn a flag is the area goes crazy." He argued that flag burning "incites riots" and that those who are convicted would face a year in prison.

The problem with this formulation is that it is a recipe for stifling any speech deemed controversial. We've been down this road before.

In 1949, the Supreme Court exonerated a suspended Catholic priest, Father Arthur Terminiello, after he made an inflammatory speech in Chicago. He was arrested and prosecuted for breaking a Chicago ordinance prohibiting speech deemed to

“stir the public to anger” or create a disturbance.

If his conviction had not been overturned, a mob could threaten to riot whenever they learned that someone whom they disagree with was schedule to speak at a particular venue. This is what legal analyst Harry Kalven called the “heckler’s veto.” It puts the blame on those who want to express themselves.

Ergo, Trump’s rationale for objecting to the Supreme Court’s decision allowing flag burning is a non-starter. But is also wrong to say that he has no basis for objecting to that ruling. Conservative pundit Dana Loesch errs when she says, “the government has no right to control speech or expression.” In fact, it does all the time, without controversy.

We have laws in this country against libel, perjury, obscenity, incitement to riot, infringement on copyright, treasonous speech, bribery, harassing phone calls, false advertising and the like. Someone who lies on his resume cannot seek relief by invoking free speech. Thus, her position holds no water.

Where the Supreme Court erred was in declaring flag burning to be speech. It is not—it is conduct.

Supreme Court Justice Hugo Black considered himself to be a First Amendment absolutist. In 1960, he wrote in a law journal, “It is my belief that there *are* ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by those who knew what the words meant, and meant their prohibitions to be ‘absolutes’….”

Not only was Black wrong about that, he later proved he was not the absolutist he claimed to be. His dissents in four “free speech” cases proves it. Here’s one of them.

In 1969, twenty years before *Texas v. Johnson*, the Supreme Court took up a flag burning case that overturned the

conviction of a man who burned the American flag while also making contemptuous speech about it. In *Street v. New York*, the court ruled that his speech was clearly protected, but it balked on whether flag burning should be considered "action."

Black, the "absolutist," dissented, arguing that "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against."

Another liberal, Justice Abe Fortas, agreed with Black in his dissent. "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest." He also pointed out that the flag is not like any other property.

In the 1989 decision, the four dissenting judges, led by Chief Justice William Rehnquist, agreed with that position by emphasizing the cultural significance of the flag. Rehnquist also took Black's position by saying flag burning was conduct, not speech.

Much of the confusion over this issue revolves around the difference between "speech" and "expression." They are not identical, which is why attempts to conflate them are misguided. Speech, as the Founders understood it, was to be protected because it was foundational to freedom. It was political speech—the right to agree or disagree about the makings of the good society—that was their concern.

Expression is a very elastic term, covering conduct that has nothing to do with what the Founders envisioned. For example, the ACLU considers dwarf-tossing, mud wrestling, sleeping in parks, and the right of demonstrators to stop traffic on bridges, to be protected speech. This trivializes the First Amendment. Indeed, it is insane.

Trump has reintroduced a subject worthy of much discussion, even if his particular stance is problematic.